IN THE

UNITED STATES COURT OF APPEALS FOR VETERANS CLAIMS

NO. 15-4154

WILLIAM A. IZZARD,

Appellant,

v.

ROBERT A. MCDONALD,
SECRETARY OF VETERANS AFFAIRS,

Appellee.

APPELLANT'S BRIEF

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I. STATEMENT OF THE ISSUES

Whether the Board of Veterans' Appeals (Board *or* BVA) committed prejudicial error in denying a rating in excess of 10% for service-connected posttraumatic stress disorder (PTSD) with alcohol dependence from April 23, 2008, through June 13, 2012.

II. STATEMENT OF THE CASE

A. Nature of the Case

William A. Izzard (Appellant *or* Mr. Izzard) claims entitlement to a compensable rating of 30% for service-connected PTSD with alcohol dependence from April 23, 2008, through June 13, 2012.

B. Course of Proceedings and Result Below

Mr. Izzard served on active duty from May 1968 to April 1970. R. 3 (2-18), 610 (602-38). His military decorations include the Bronze Star Medal, the National Defense Service Medal, the Combat Infantryman Badge, the Vietnam Service Medal, the Vietnam Campaign Medal, and two Overseas Service Medals. R. 610 (602-38). A September 2008 rating decision granted service connection for PTSD with alcohol dependence, and assigned a non-compensable (0%) evaluation, effective April 23, 2008. R. 796 (796-97). In May 2009, a Decision Review Officer increased the rating to 10%, effective April 23, 2008. R. 784 (784-87).

Subsequently, the Veteran's PTSD was rated 30% effective June 14, 2012, R. 737 (731-740), and, ultimately, 50%, effective the same date. R. 708 (708-10).

The Board found that medical evidence during the period prior to June 14, 2012, did not reflect a level of disability consistent with a 30% rating, despite noting that Mr. Izzard experienced such symptoms as depression, anxiety, sleep disturbance (e.g., nightmares and cold sweats), and irritability. R. 12-13 (2-18). After noting competent evidence from Mr. Izzard and his wife regarding his symptomatology, and without challenging their credibility, the Board found the examination reports and clinical records "to be more probative than the Veteran's subjective complaints of increased symptomatology." R. 14 (2-18). The Board further noted statements from a VA therapist during the critical time that Mr. Izzard "suffered from moderate social and familial impairment as a result of his PTSD," R. 12-13 (2-18), but, nevertheless, failed to discuss why such favorable evidence was consistent with "mild or transient" symptoms. R. 14 (2-18).

The Board entered the appealed decision on September 2, 2015. R. 2 (2-18). A timely appeal to the Court was filed on November 2, 2015. *See* 38 U.S.C. § 7266.

C. Facts Relevant to the Issues

Except as may otherwise be noted below, Appellant accepts the evidence set forth in the BVA decision on appeal, and that evidence is deemed incorporated

herein by reference. This evidence, however, will be augmented or clarified as necessary.

III. ARGUMENT

A. Summary of the Argument

In concluding, without a proper analysis, that, from April 23, 2008, through June 13, 2012, Mr. Izzard's PTSD impairment was only "mild or transient," the Board failed to: (1) give proper weight to favorable, competent, and credible lay evidence submitted by Mr. Izzard and his wife; (2) explain its rejection of medical evidence favorable to an increased rating; and (3) adequately explain why select medical evidence was more probative than the lay evidence.

B. Specific Arguments

1. Ratings Criteria Demonstrate That Mr. Izzard's Symptoms Are Consistent With a 30% Rating

Under the General Rating Formula for Mental Disorders, a 30% rating is warranted when the evidence demonstrates a veteran suffers from, among other things, depression, anxiety, and chronic sleep impairment:

> Occupational and social impairment with occasional decrease in work efficiency and intermittent periods of inability to perform occupational tasks (although generally functioning satisfactorily, with routine behavior, self-care, and conversation normal), due to such symptoms as: depressed mood, anxiety, suspiciousness, panic attacks (weekly or less often), chronic sleep impairment, mild memory loss (such as forgetting names, directions, recent events).

38 C.F.R. § 4.130 (2015). In contrast, a 10% rating is warranted when the evidence shows "[o]ccupational and social impairment due to **mild** or **transient** symptoms which decrease work efficiency and ability to perform occupational tasks only during periods of significant stress, or symptoms controlled by continuous medication." *Id.* (emphasis added).

In an increased rating case involving psychiatric disability, the symptoms listed in the rating schedule are not exhaustive, and the Board need not find the presence of all, most, or even some of the enumerated symptoms. *Mauerhan v. Principi*, 16 Vet. App. 436, 442 (2002). "Where there is a question as to which evaluations shall be applied, the higher evaluation will be assigned if the disability picture more nearly approximates the criteria required for that rating." 38 C.F.R. § 4.7 (2015).

In reaching its decision, the Board noted that Mr. Izzard suffered from several of the enumerated symptoms consistent with a 30% rating during the critical period, including depression, anxiety, sleep disturbance (e.g., nightmares and cold sweats), and irritability. R. 12-13 (2-18). Despite these findings, the Board denied Mr. Izzard a ratings increase beyond 10%. R. 14 (2-18).

2. Lay Evidence From Mr. Izzard and His Wife Support a 30% Rating

The record contains statements from Mr. Izzard and his wife describing the seriousness of his PTSD prior to June 2012. For example, Mr. Izzard stated in a May 2008 correspondence and at a September 2008 VA examination that he experienced several stress-related issues since returning home from Vietnam, including having "anxious butterflies;" being easily startled and irritated; experiencing nightmares and depression; feeling depressed and anti-social; and not being "effective in job interviews." R. 519 (515-521), 431 (426-434).

His wife stated in a May 2008 correspondence that Mr. Izzard had various stress-related issues that were becoming increasingly worse, such as being very emotional, obsessing over issues of war, not sleeping, and being easily startled. R. 517 (515-521). The increase, she stated, was due to Mr. Izzard having "so much time on his hands" as his children had moved away from home and he had recently lost his job. *Id.* She stated further that because of the increased stress, "he has had difficulty and been nervous in job interviews." *Id.*

All of this evidence—from both Mr. Izzard and his wife—demonstrate that he suffered from symptoms consistent with a 30% rating during the critical period. For example, he suffered from a "depressed mood, anxiety, . . . panic attacks (weekly or less often), and chronic sleep impairment." *See* 38 C.F.R. § 4.130 (2015). And, further, he had "[o]ccupational and social impairment with

occasional decrease in work efficiency and intermittent periods of inability to perform occupational tasks," as evidenced by the difficulty and nervousness he encountered when interviewing for jobs due to his increasingly worsening symptoms. *See id.*

After noting some of the evidence from Mr. Izzard and his wife, the Board stated that Mr. Izzard was competent to testify as to his own health, R. 14 (2-18), and did not question either Mr. Izzard's or his wife's credibility. *See Allday v. Brown*, 7 Vet. App. 517, 527 (1995) (Board must analyze credibility and probative value of evidence, account for evidence it finds to be persuasive or unpersuasive, and provide reasons for rejection of any material evidence favorable to the veteran). Nevertheless, the Board elevated select medical evidence above the lay evidence cited herein. R. 14 (2-18). By omitting an adequate explanation for doing so, the Board failed to provide sufficient reasons or bases for not affording the lay evidence of record proper weight. *See King v. Shinseki*, 700 F.3d 1339, 1344 (Fed. Cir. 2012) ("lay evidence is one type of evidence that must be considered and that competent lay evidence can be sufficient in and of itself."). Accordingly, the Board's failure to credit the lay evidence submitted by Mr. Izzard and his wife is prejudicial.

3. Medical Evidence Supported at least a 30% Rating

In addition to the lay evidence submitted by Mr. Izzard and his wife that supported a 30% rating, the record contains medical evidence that is, likewise, consistent with a 30% rating; i.e., occupational and social impairment with occasional decrease in work efficiency and intermittent periods of inability to perform occupational tasks due to the enumerated symptoms. For example, after noting his wartime traumas and the symptoms from which he was suffering, a VA therapist, in a March 2009 note, stated, "In my opinion, and that of other treatment providers, Mr. Izzard has been deeply, negatively affected by his combat history, and that he has suffered moderate social and familial impairment as a result." R. 407, (403-07). Also, in an April 2009 VA examination report, a VA examiner noted that although he was not having suicidal thoughts at present, they had "come and gone over the years," his last one having come six months prior. R. 374 (373-83).

Thus, even medical evidence indicates that Mr. Izzard suffered from occupational or social impairment due to more than merely "mild or transient symptoms." Indeed, the March 2009 note emphasized that Mr. Izzard suffered from "moderate social and familial impairment as a result" of his symptoms, demonstrating more than mere "mild or transient" indicators. R. 407, (403-07); *see* 38 C.F.R. § 4.130 (2015) (explaining "mild or transient symptoms" are consistent

with a 10% rating). Yet, the Board found that the Mr. Izzard showed only "mild to transient" symptoms consistent with a 10% rating during the critical time. In reaching its decision, however, the Board failed to explain why it rejected the medical evidence in favor of an increased rating. *Mitchem v. Brown*, 9 Vet. App. 138, 140 (1996) ("The need for an adequate statement of reasons or bases is particularly acute when BVA findings and conclusions pertain to the degree of disability resulting from mental disorder such as PTSD.").

Indeed, after noting the contents of the March 2009 note and the April 2009 VA examination report, the Board, relying solely on statements from the September 2008 VA examination report, found the medical evidence to be consistent with a 10% rating. But there is no evidence that his symptoms were, with the exception of suicidal thoughts, transient during this period. To the contrary, the evidence demonstrates that, during the critical period, Mr. Izzard's symptoms were both substantial and persistent, weighing against the Board's finding that his symptoms were merely mild or transient.

Accordingly, the Board failed to provide adequate reasons or bases for rejecting the March 2009 note and the April 2009 VA examination.

4. The Board's Reliance on Unfavorable Medical Evidence Constitutes Legal Error

The Board's decision evidences a heavy reliance on the September 2008 VA examination. The Board noted that, upon examination, Mr. Izzard appeared well-dressed and groomed; did not suffer from hallucinations, or suicidal or homicidal ideation; was happily married; had 6-8 friends; enjoyed cooking and yard work; and was capable of managing his own funds. R. 12-13 (2-18). Further, the Board stated "the examiner concluded that the Veteran's PTSD symptoms had no negative impact on his ability to obtain and maintain physical or sedentary employment and caused minimal interference with his social functioning." *Id.*

In finding that the medical evidence during the critical period did not support a rating in excess of 10%, the Board merely reiterated the contents of the 2008 VA examination. The Board did so without properly crediting or analyzing either the lay evidence submitted by Mr. Izzard and his wife, or the March 2009 note and the April 2009 VA examination, and, in so doing, failed to reconcile the evidence, thereby committing legal error. *See* 38 C.F.R. § 4.2 ("It is the responsibility of the rating specialist to interpret reports of examination in the light of the whole recorded history, reconciling the various reports into a consistent picture so that the current rating may accurately reflect the elements of disability present."). Further, by failing to adequately explain its reasons or bases for rejecting evidence favorable to an

increased rating, the Board, again, committed legal error. *See Allday*, 7 Vet. App. at 527.

5. The Board Elevated Select Medical Evidence Over Lay Evidence Without Explanation

After having outlined both lay and medical evidence (some of which is favorable to an increased rating), the Board inexplicably found selected medical evidence to be more probative than the lay evidence, stating only that the medical personnel who evaluated the Veteran were competent to identify Mr. Izzard's specific level of disability according to appropriate diagnostic codes. *See Moore v. Nicholson*, 21 Vet. App. 211, 218 (2007) (explaining the examiner is not tasked with assigning the disability rating) *overruled on other grounds by Moore v. Shinseki*, 555 F.3d 1369, 1370 (Fed. Cir. 2009); 38 C.F.R. § 4.6 (2015). Merely adopting an examiner's medical conclusion as to the level of disability within the confines of the rating schedule does not satisfy the Board's reasons or bases requirement, or its obligation to independently apply the law to the facts and decide the appeal. *See* 38 C.F.R. §§ 4.2, 4.6, 4.126 (2015). Thus, the Board erred by failing to explain why the 2008 VA examination report was more probative than first-hand experiences and observations by Mr. Izzard and his wife, or the March 2009 note and the April 2009 VA examination report. 38 C.F.R. § 4.126 ("The rating agency shall assign an evaluation based on all the evidence of record that

bears on occupational and social impairment rather than solely on the examiner's assessment of the level of disability at the moment of the examination.").

Further, in an increased rating claim, the present level of disability is of primary importance such that the most recent evidence is ascribed more weight. *See Francisco v. Brown*, 7 Vet. App. 55, 58 (1994) ("Regulations do not give past medical reports precedence over current findings."). Both the March 2009 note and the April 2009 VA examination, which indicate symptoms consistent with moderate social and occupational impairment during the critical period, post-date the 2008 VA examination. Thus, they are more recent and considerably more important than the 2008 VA examination. *See id.* But despite this, the Board found the 2008 VA examination to be the most probative evidence, without explaining why other, credible evidence was rejected. That was error.

At minimum, the Board failed to consider the provisions of 38 C.F.R. § 4.7, which requires application of a higher rating when there is a close question between the two. *See Pierce v. Principi*, 18 Vet. App. 440, 445 (2004) (holding that a failure to apply regulations including 38 C.F.R. § 4.7 in an increased rating case may constitute error). When the evidence, including competent, credible lay evidence, is viewed in its entirety, it is clear that during the critical period, Mr. Izzard exhibited far more than "mild or transient" symptoms.

Accordingly, the Board failed to provide an adequate statement of reasons or bases for dismissing the evidence provided by Mr. Izzard and his wife, and the March 2009 note and the April 2009 VA examination, as less probative than select medical evidence of record. *See Allday v. Brown*, 7 Vet. App. at 527.

IV. CONCLUSION

Appellant respectfully requests that the September 2, 2015, BVA decision be vacated to the extent that the Board failed to afford proper weight to the evidence provided by Mr. Izzard and his wife, consider the March 2009 note and the April 2009 VA examination report, and provide adequate reasons or bases for dismissing such evidence as less probative than select, earlier medical evidence of record. Where the Board has incorrectly applied the law, failed to provide an adequate statement of reasons or bases, or where the record is otherwise inadequate, remand is the appropriate remedy. *Tucker v. West*, 11 Vet. App. 369, 374 (1998). On remand, re-adjudication should be accomplished in accordance with the above discussion.

Respectfully submitted,

/s/ Christopher B. McKinley

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